United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7209

B
P/S

In The

United States Court of Appeals

For The Second Circuit

IRVING ELLENTUCK AND MILDRED ELLENTUCK, MARK R. BRYCE AND ROBERTA BRYCE, A. GERARD HYDE, SAUL NOVAK, LEONARD SAVINO AND KEVIN P. WILKINSON AND MARGARET WILKINSON, on their own behalf and on behalf of other adjoining property owners who objected to and who object to the granting of a variance to the subject premises permitting a Class A Multiple Dwelling therein, and all others similarly situated,

Plaintiffs-Appellants,

-against-

JOSEPH B. KLEIN, PHILIP AGUSTA, HOWARD B. HORNSTEIN, HENRY M. CARROLL AND JOHN P. WALSH as Commissioners constituting the Board of Standards and Appeals of the City of New York, PHILIP AGUSTA, HENRY M. CARROLL and JOHN P. WALSH, Individually, JEREMIAH T. WALSH as Commissioner of Building of the City of New York, H. IRVING SIGMAN, as Borough Superintendent of the Borough of Queens and Individually,

(Continued on Reverse)

FILED

UNITED STATES COURT OF APPEALS
FILED
JUL 20 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BRIEF FOR APPELLEE KIMBALL CONSTRUCTION CO., INC., JOHN KIMBALL AND MARIE A. KIMBALL

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LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

ERLING KARLSEN as Inspector of the Department of Buildings of the City of New York and Individually, JOSEPH STEIN as Former Commissioner of Buildings of the City of New York, KIMBALL CONSTRUCTION CO. INC., JOHN KIMBALL and MARIE A. KIMBALL, as Officers and Directors of the Kimball Construction Co. Inc., and Individually, RICHMOND HILL SAVINGS BANK, JULIUS GRANIRER, THE HONORABLE M. HENRY MARTUSCELLO, HENRY J. LATHAM, JOHN P. COHALAN JR., SAMUEL RABIN AND VITO J. TITONE, as Justices of the Supreme Court of the State of New York, Appellate Division, Second Department, and THE HONORABLE ALFRED D. LERNER, as Judge of the Supreme Court of the State of New York, County of Queens,

Defendants-Appellees.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

IRVING ELLENTUCK et al.,

Plaintiffs-Appellants

- against -

Docket No. 77-7209

JOSEPH B. KLEIN et al.,

Defendants-Appellees

- X

BRIEF FOR RESPONDENTS KIMBALL CONSTRUCTION CO., INC., JOHN KIMBALL and MARIE A. KIMBALL

The proceedings between Plaintiffs-Appellants and Kimball Construction Co., Inc. (hereinafter "Kimball"), have been protracted, vexatious and exhaustive, and as hereinafter set forth, the same issues have been reviewed in various courts of the State of New York (from Supreme Court to the Court of Appeals) during the last three years. The initiation of the lawsuit in the United States District Court was a bald attempt to cause further economic harm and frustration to John and Marie Kimball, principals of "Kimball". By bringing this action in District Court and filing a complaint and amended complaint filled with false and fallacious allegations, the Appellants and their attorney, in fact, violate the civil rights of the Respondents. It is unfortunate that our system of jurisprudence affords litigants and their attorneys the opportunity to harass innocent people and permits vexatious, expensive and duplicative claims.

HISTORY OF CASE

On June 14, 1972, Kimball purchased a building at 131-16 Rockaway Beach Boulevard, Queens, New York, for $62,500, from the Sisters of Reparation of the Congregation of Mary, Inc. John and Marie Kimball reside at 535 Beach 134th Street, Belle Harbor, New York, which is just a few blocks from the building. John Kimball was familiar with the building as he is a general building contractor, and while the Sisters owned the building (for over twenty years), he had done various contracting work for the owners. The Sisters expressed an interest to sell the building to Kimball as same was in need of repair and they believed that Kimball would renovate and improve the structure, keeping in mind the interests of other property owners in the neighborhood.

At the time of acquisition by Kimball, the building contained approximately 24 bedrooms, 10 bathrooms, a large dining room, a commercial kitchen, a laundry room and a garage. Prior to the purchase date, John Kimball reviewed records on file at the Queens office of the New York City Department of Buildings and found that the building had previously been accepted as a Class "B" multiple dwelling (rooming house) and that in December, 1950, an altered building application (alteration application 2918/1950) was submitted to the Department of Buildings by the "Sisters", showing "existing legal use" for furnished rooms, and that the proposed occupancy by the Sisters was to be for similar uses. Further, the Department of Buildings

application specified that the use and occupancy of the building was "Class 'B' Heretofore Converted Dwelling" (furnished rooms).

Based primarily upon the records maintained by the Department of Buildings, which classified the subject premises as "Class 'B' Heretofore Converted Dwelling" or a Class "B" multiple dwelling (rooming house), conversion to a Class "A" multiple dwelling was permitted under the New York City Zoning Resolution (per Section 52-61) in this R2 Zoning District (one nonconforming use to another nonconforming use). Kimball thereafter purchased the property and plans to convert the building were filed with the New York City Department of Buildings on June 30, 1972, under Alteration Application 688/1972. On or about November 8, 1972, the altered building plans were approved by the New York City Department of Buildings, and on November 17, 1972, a construction permit was issued by the Borough Superintendent. Work was immediately commenced in furtherance of the approved plans for the conver n of the Class "B" multiple dwelling (rooming house) to a Class "A" multiple dwelling containing 14 separate dwelling units.

Shortly thereafter, the Belle Harbor Property Owners Association, Inc., sought to have the building permit invalidated, and a meeting was held with H. I. Sigman, the Borough Superintendent of the Department of Buildings in Queens. By intradepartmental memorandum dated December 8, 1972, Mr. Sigman

communicated with the Building Commissioner, Joseph Stein, detailing the history of the conversion, and wrote in part: "It is the opinion of this office that the plans and application are properly approved". Other correspondence was subsequently exchanged between the Belle Harbor Property Owners Association, Inc., and Commissioner Joseph Stein, and thereafter, by letter of January 31, 1973, Commissioner Stein notified the President of the Property Owners Association that: "In view of all of the above, I regret that I must deny your request to revoke Application 688/72, based on Section 52-61 of the Zoning Resolution". However, as a result of the objections, the Commissioner directed that the entire building be sprinklered and that each dwelling unit be provided with a second means of egress.

In about December of 1972, an action was instituted by several persons claiming to be property owners in the area surrounding the subject building, against the New York City Commissioner of Buildings, Joseph Stein, Borough Superintendent Sigman, Buildings Department Examiner Karlsen, and Kimball Construction Co., Inc. The lawsuit, commenced in Supreme Court, Queens County, sought to vacate the building permit, declaring same null and void in violation of the New York City Zoning Resolution, and requested that Kimball be permanently enjoined and restrained from altering the premises and from constructing any apartments. On June 18, 1973, after a trial on the merits before the court without jury (Supreme Court, Queens County, Livoti, J., presiding), the complaint was dismissed by the court

on the grounds that the prior use by the Sisters had been nonconforming and that the proposed conversion constituted a permissible change from Class "B" to Class "A" occupancy. The Appellant property owners appealed the judgment, designating the January, 1974, term of the Appellate Division, Second Department, for argument.

On March 13, 1974, after the appeal had been submitted, but before it was decided, Kimball received a Certificate of Occupancy from the Department of Buildings for the building, which specified that "the building conforms substantially to the approved plans and specifications, and to the requirements of the Building Code, the Zoning Resolution, and all other laws and ordinances, and the rules of the Board of Standards and Appeals".

On April 29, 1974, approximately one-and-a-half months after the Certificate of Occupancy had been issued by the Department of Buildings, the Appellate Division, Second Department, rendered a decision, reversing the judgment appealed from, declaring that the permit was null and void, and that the proposed alteration was illegal and enjoining Kimball from further construction under the permit and from altering the premises to a Class "A" multiple dwelling.

On the day that the Appellate Division decision was rendered, five tenants were residing in the building and, as aforementioned, the Certificate of Occupancy had been issued. Based upon the decision of the Appellate Division, the New York City Department of Buildings thereupon filed an application with the Board of Standards and Appeals of the City of New York (hereafter the "Board"),

pursuant to City Charter Section 1804 (3) (c) (6) for revocation of the previously issued Certificate of Occupancy, and after hearings were held, the Board, on October 1, 1974, revoked the Certificate of Occupancy.

On October 23, 1974, Kimball filed an application with the Board pursuant to Section 72-21 of Article VII, Chapter 2, of the New York City Zoning Resolution, requesting a variation of the Zoning Resolution to permit the continued maintenance of the building as a Class "A" multiple dwelling. The Zoning Resolution of the City of New York, adopted by the New York City Board of Estimate, on December 15, 1960, effective December 15, 1961, and as subsequently amended, confers statutory power upon the Board under Section 72-21, to grant variations of the Zoning Resolution where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such provision, and where the Board makes five findings as required under Section 72-21.

Subsequently, Respondent Kimball's attorney was notified that the hearing before the Board would be held on January 28, 1975. In accordance with the rules of procedure of the Board, property owners residing within 400 feet of the property were duly notified by mail of the hearing and the Chairman of Community Planning Board #14, the local community board having jurisdiction in the area of the premises, was also notified of Kimball's variance request. Community Board #14 held a public hearing on the application and subsequently notified the Board of Standards and Appeals that it would not make any recommendation in this

application - pro or con - and was maintaining a neutral position. The Board held three lengthy hearings on January 28, 1975, February 18, 1975, and March 11, 1975, and extensive documentation and evidence was presented to the Board.

On March 25, 1975, the Board determined that the evidence in the record "supports the findings required to be made under Section 72-21 of the Zoning Resolution, and that the applicant is entitled to relief on the grounds of practical difficulty and/or unnecessary hardship...to permit in an R2 District the maintenance of an existing four-story building as a multiple dwelling...on condition that the occupancy be limited to eleven (11) dwelling units plus one caretaker's apartment". The Board thereby reduced the number of units as previously approved.

On March 27, 1975, an ex parte order was signed by Justice Frank D. O'Connor, Supreme Court, Queens County, sitting at Special Term, Part II, initiating a proceeding brought on by Appellants, or some of them, pursuant to Section 7804 of the New York Civil Practice Law and Rules to review the aforementioned determination of the Board of Standards and Appeals, which order contained a stay of the Board's decision. The proceeding first appeared at Special Term, Part I, in Supreme Court, Queens County, before Justice John Leahy on April 9, 1975. The Corporation Counsel of the City of New York, on behalf of the Board of Standards and Appeals, requested an adjournment to secure the Board's voluminous transcript, answer and return, and the matter was thereupon adjourned for three months. The attorney for Kimball vigorously opposed the stay, granted without any bond or undertaking, but Justice Leahy granted the request for adjournment

to July 9, 1975, and continued the restraining order contained in the ex parte order signed by Justice O'Connor. A motion was made shortly thereafter for re-argument on the continuance of the stay, which motion was granted; but Justice Leahy refused to vacate the stay or impose any terms or conditions.

Thereafter, the proceeding came on before Honorable Justice Alfred D. Lerner in Supreme Court, Queens County, on September 8, 1975, and arguments were made and papers submitted by all parties. On October 14, 1975, Justice Lerner rendered a decision transferring the proceeding to the Appellate Division, Second Department, without deciding the merits of the case.

Thereafter Appellants made application in the Appellate Division to proceed on the Appendix Method in lieu of a full printed record on appeal. Kimball cross-moved to vacate the stay or require that Appellants post a bond pending the decision on the appeal. Appellants' motion was granted on various conditions; Kimball's motion was denied on condition that the proceeding be perfected for the February 1976 term.

On January 30, 1976, the Appellate Division, Second Department, by unanimous decision (Exhibit "A") confirmed the determination of the Board of Standards and Appeals. The Appellants thereupon filed a notice of appeal with the Court of Appeals of the State of New York, appealing the decision of the Appellate Division, on constitutional grounds. On April 6, 1976, the Court of Appeals dismissed Appellants' appeal "upon the ground that no substantial constitutional question is directly involved".

The Appellants than made a motion in the Appellate Division,

Second Department, for an order vacating and declaring null and void the decision of the Appellate Division. On April 27, 1976, the Appellate Division, Second Department, granted Appellants' motion to the extent of permitting re-argument and reconsideration, and upon such, the court's decision, dated March 1, 1976, was adhered to (Exhibit "B").

Simultaneously, Appellants filed a notice of motion in the Court of Appeals for leave to appeal the decision of the Appellate Division, rendered on January 30, 1976. On May 6, 1976, the Court of Appeals denied Appellants' application for leave to appeal.

Appellants did not thereafter appeal to the Supreme Court of the United States, but instead, made a motion in Supreme Court, Queens County, to vacate a judgment entered with the Queens County Clerk, based upon the Appellate Division decision. Supporting and opposing papers in this application were submitted at Special Term, Part I, Supreme Court, Queens County, on July 12, 1976. On July 23, 1976, Judge Alfred Lerner denied Appellant's request to vacate the previously entered judgment (Exhibit "C"). The Appellants thereupon once again filed a notice of appeal with the Court of Appeals of the State of New York, appealing the decision of the Appellate Division on constitutional grounds. On September 8, 1976, the Court of Appeals dismissed Appellants' appeal for the third time, "sua sponte, upon the ground that no substantial constitutional question is directly involved" (emphasis by the Court).

The frivolous, false and vague allegations in the Appellants'

complaint in the action commenced in Federal District Court were employed as a tool to allow Appellants to attempt to open the door to yet another court and pervert the judicial process, as a last ditch effort by Appellants' counsel to frustrate the Kimballs and cause further economic and emotional harm to them.

In three separate applications, these Appellants requested the Court of Appeals of New York to review the decision of the Appellate Division; and in each and every instance that court refused to reverse the decision of the Appellate Division. Appellants' remedy after the Court of Appeals' refusal to reverse the Appellate Division decision was by appeal to the Supreme Court of the United States. Instead, Appellants' counsel: 1) filed a ludricous motion in the Supreme Court, Queens County, requesting that inferior court to annul the decisions of the Appellate Division and the Court of Appeals; and 2) then made a further attempt to alter the statutory process of review by bringing an action in the Federal District Court. The same persons involved in all the phases of the State Litigation commenced the action in the United States District Court, Southern District of New York, although the numbers have been reduced since the lawsuit in Supreme Court, Queens County. The action was, purportedly, a class action suit, asserting claims under the Civil Rights Acts on behalf of the same class described in the State courts. A motion to dismiss, pursuant to Rule 12 (b) (1) and (6) of the Federal Rules of Civil Procedure, was granted by the Honorable Lawrence W. Pierce, by way of a Memorandum and Order, dated March 31, 1977, and judgment, dated April 4, 1977, "dismissing the amended complaint in its entirety, with prejudice and with

costs to be taxed".

The New York State courts have confronted each and every constitutional claim raised by the Appellants in the United States District Court. The claims asserted by Plaintiffs-Appellants are barred by the Doctrines of Res Judicata and Collateral Estoppel. The issues framed in Plaintiffs-Appellants' complaint in Federal District Court were fully reviewed by the Appellate Division, of the State of New York, Second Department, and the New York Court of Appeals of the State of New York, and the judgments of those courts are conclusive of the rights, questions and facts now presented. Plaintiffs-Appellants are closed off by the doctrine of collateral estoppel and res judicata, as the issues raised in the Federal Court complaint were addressed and finally adjudicated by the New York State Appellate courts. It is a fundamental principle that material facts or questions which were in issue in a former action, and were there judicially determined, are conclusively settled by a judgment rendered therein and may not be litigated in a subsequent action.

The following is submitted to show that each issue and allegation contained in Appellants Federal complaint, has previously been presented to the Appellate Division of the State of New York and the Court of Appeals:

1. Notice dated March 10, 1976, submitted by Plaintiffs-Appellants to the Court of Appeals of the State of New York, appealing the decision of the Appellate Division of March 1, 1976, on

"constitutional grounds" (Exhibit "D").

2. Order to Show Cause, dated March 11, 1976, affirmation of Dora Aberlin, dated March 10, 1976, and supporting documents. (Exhibit "E").

3. Notice of Cross Motion dated March 18, 1976; Affirmation of Sheldon Lobel, dated March 18, 1976; Affidavit of Marie A. Kimball, dated March 18, 1976 (Exhibit "F").

4. Affirmation of Dora Aberlin, dated March 25, 1976, and supporting documents (Exhibit "G").

5. Memorandum in Support of Motion (Exhibit "H").

6. Decision of Court of Appeals of the State of New York, dated April 6, 1976 (Exhibit "I").

7. Notice of Motion for Leave to Appeal and supporting papers, dated April 16, 1976 (Exhibit "J").

8. Notice of Cross Motion and supporting papers in Opposition to Motion for Leave to Appeal (Exhibit "K").

9. Exhibits submitted to court (Exhibit "L").

10. Decision of the Court of Appeals, dated May 6, 1976 (Exhibit "M").

11. Notice of Appeal to the Court of Appeals, dated May 4, 1976 (Exhibit "N").

12. Decision of the Court of Appeals, dated September 8, 1976 (Exhibit "O").

Plaintiffs specifically requested that the Court of Appeals review the decisions of the Appellate Division on constitutional issues, and the Court of Appeals determined that no constitutional questions were involved.

Section 5601 (b) of the New York Civil Practice Law and Rules sets forth the criteria for appeal to the Court of Appeals on constitutional grounds. The section declares:

> Constitutional Grounds. An appeal may be taken to the Court of Appeals as of right:
>
> 1. from an order of the Appellate Division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States.

The Court of Appeals determined that there were no substantial constitutional questions in this case. Plaintiffs attempt to relitigate the same issues in Federal Court. The papers submitted to the Court of Appeals and the papers filed in this action, are almost identical in both courts. For example:

Plaintiffs' Papers in Federal District Court	Plaintiffs' Papers in Court of Appeals
Memorandum of Law in support of Plaintiffs' motion: pps 16 - 24. (Exhibit "P")	Affirmation of Dora Aberlin in opposition to Motion to Dismiss Appeal - pps 2 - 5.
Letter of Richmond Hill Savings Bank to Board of Standards and Appeals (Plaintiffs' Exhibit 16).	Plaintiffs' Brief - p.51b. Plaintiffs' Exhibit 10 attached to affirmation in in opposition to Motion to dismiss appeal. (Letter of Richmond Hill Savings Bank to Board of Standards and Appeals.

Plaintiffs' Papers in Federal Court (cont'd.)	Plaintiffs' Papers in Court of Appeals
	Petitioners' Exhibit "A" annexed to Notice of Motion for leave to appeal to Court of Appeals. (Letter of Richmond Hill Savings Bank to Board of Standards and Appeals).
Affirmation of Dora Aberlin attached to Notice of Motion (pps 33 - 41) as to hearings held before Board of Standards and Appeals.	Affirmation of Dora Aberlin to Court of Appeals, dated March 10, 1976 (pps 8 - 10).
(See Index to Memorandum Point V), "Under New York State Law, the determination was void because of participation by disqualified judge."	Brief in Court of Appeals. See Table of Contents Point XIII - "The decision of the Appellate Division, dated March 1, 1976, is void in that one of the judges participating therein was disqualified".
Pps 34 - 37 - various provisions of N.Y.C. Building Code, etc.	Exact language in pages 30b - 32b, brief submitted to Court of Appeals.

Plaintiffs' Papers in Federal Court (cont'd.)	Plaintiffs' Papers in Court of Appeals
Point VIII - When two or more points arise and are argued... pps 19b - 20b.	Plaintiffs' brief: Point IV - When two or more points arise and are argued...pps 41 - 42.
Point IX - In administrative hearings involving property rights, the fundamental principles of due process must be observed. pps 43 - 48.	Point X - In administrative hearings involving property rights, the fundamental principles of due process must be observed. pps 34b - 38b.

Also, see pages 36 through 60 of the affirmation of Aberlin in Federal Court - almost identical with pps 8 - 12 of memorandum in support of motion submitted in Court of Appeals.

The Court of Appeals addressed itself to the constitutional issues at Plaintiffs' request in two applications, and both times, the court determined that no constitutional questions were involved in this case. The Plaintiffs are attempting to relitigate issues which were previously decided by the courts in New York State, and attempt to use the Civil Rights Law as a substitute for the right of appeal. Coogan v. Cincinnati Bar Ass'n, 431 F2d 1209. Bradford Audio Corp. v. Pious, 392 F2d 67.

THE NEW YORK STATE COURTS HAVE CONFRONTED EACH AND EVERY CONSTITUTIONAL CLAIM RAISED BY THE APPELLANTS IN THE UNITED STATES DISTRICT COURT. THE CLAIMS ASSERTED BY PLAINTIFFS-APPELLANTS ARE BARRED BY THE DOCTRINE OF RES JUDICATA AND COLLATERAL ESTOPPEL.

In Turco v. The Monroe County Bar Association, et al, ___F2d_____(2d Cir. decided April 21, 1977), the United States Court of Appeals decided that "[S]tate Courts, as much as federal courts, are bound by and required to follow the United States Constitution. Turco, as appellees did in Huffman v. Pursue, Ltd., 420 U.S.592 (1975) is urging [the Court] to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilites. And like the Supreme Court, "this we refuse to do". Id.,420 U.S. at 611.

Judge Gurfein, writing for the court, added:

"We hold that the constitutional claims of lack of due process are banned from consideration by the federal district court under the doctrines of res judicata and collateral estoppel. Appellant raised the due process points in both the Appellate Division and in seeking review in the Court of Appeals".

"Dismissal by a New York State court because the asserted federal constitutional issues were not 'issues which rise to the dignity of constitutional questions' is tantamount to a dismissal of the constitutional issues on the merits. See Mc Cune v. Frank, 521 F.2d 1152, 1155 (2d Cir. 1975). The Court of Appeals' denial of an appeal as of right here, as well as of discretion, determined that the constitutional issues specifically raised were insubstantial on the merits", Turco, Supra.

Appellants raised each and every constitutional claim in the New York Courts that were subsequently raised in the United States District Court. On three separate applications, Appellants sought relief from the Court of Appeals, and each time the Court determined that the issues raised were insubstantial on the merits, the third time "sua sponte". Even if, however, there had been an error at some stage of the state proceedings, this does not give the Appellants the right to have the Federal District Court

act in an appellate capacity. Res Judicata, collateral estoppel, and issue preclusion still preclude the Appellants from utilizing the Federal civil rights statute as a vehicle for Federal review of a state court determination on the merits. As this court stated in Mitchell v. National Broadcasting Company, et al, ____F.2d____ (2d Cir. 1977),

"The doctrine of res judicata does not depend on whether the prior judgment was free from error. See Milliken v. Meyer, 311 U.S.457, 462, 61 S.Ct.339, 342 (1940); Treinies v. Sunshine Mining Co., 308 U.S.66, 774-78, 60 S.Ct.44, 49-51 (1939); Fauntleroy v. Lum, 210 U.S.230, 237, 28 S.Ct.641, 643 (1908); Miller v. Meinhard-Commercial Corp., 462 F.2d 358, 361 (5th Cir. 1972); Smith v. Alleghany Corp., 394 F.2d 381, 389 (2d Cir.), cert. denied, 393 U.S.939, 89 S.Ct.300 (1968). Otherwise, judgments would have no finality and the core rationale of the rule of res judicata - repose - would cease to exist. See generally 1B Moore's Federal Practice ¶0.405[4.-1], at 634-39 (1974). Indeed, if Appellant's claims of error were to decide this case, there would no longer be a distinction between direct review of an erroneous judgment and collateral attack. Here, the former was available and used by the Appellant. As to the latter, however, unlike the federal habeas corpus statutes, the federal civil rights acts do not provide for collateral review of state court judgments. Federal courts do not sit to review the determinations of state courts. Bricker v. Crane, 468 F.2d 1228, 1231 (1st Cir. 1972), cert. denied, 410 U.S.930, 93 S.Ct. 1368 (1973)."

The use of the federal district court to review a decision of the state court has been repeatedly analyzed by the United States Supreme Court, and other federal courts, and it is well established that federal district courts lack the power to review a finally adjudicated determination of constitutional claims. Rooker v. Fidelity Trust Co., 263 U.S.413 (1923); Duke v. State of Texas, 477 F.2d 244, (5th Cir. 1973); Anderson v. Locom Properties, Inc., 457 F.2d 939 (8th Cir. 1972).

The proper procedure for the Appellants herein to have followed would have been an appeal of the State courts

determinations to the United States Supreme Court. Louis Ender, Inc. v. General Foods Corp., 467 F.2d 327 (2d Cir. 1972).

The fact that a federal civil rights action is alleged to be involved is not a valid reason for denying full faith and credit to the state court proceedings. Mitchell v. National Broadcasting Company, supra; American Mannex Corp. v. Rozands, 462 F.2d 688, 690 (5th Cir.), cert. denied, 409 U.S.1040, 93 S.Ct.524 (1972). Brown v. DeLayo, 498 F.2d 1173, 1175 (10th Cir. 1974); Bricker v. Crane, supra; Phillips v. Shannon, 445 F.2d 460, 462 (7th Cir. 1971); Katz v. State of Connecticut, 433 F.2d 878 (2d Cir. 1970), aff'g, 307 F.Supp.480 (D.Conn.1969); Porter v. Nossen, 360 F.Supp. 527, 528-29 (M.D.Pa.1973), Tang v. Appellate Division of N.Y. Supreme Ct., First Dept., 487 F.2d 138, 142-43 (2d Cir. 1973), cert. denied, 415 U.S. 906 94 S.Ct. 1611 (1974).

> "The doctrine of res judicata is primarily grounded on a public policy determination which 'dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties', Baldwin v. Iowa State Traveling Men's Association, 283 U.S.522, 525 (1930), Sanchez v. Caribbean Carriers Limited, et al, _____F.2d _____(2d Cir. 1977).

The attorney for these Appellants, in a letter to the Clerk of the Court of Appeals, dated March 29, 1976 (Exhibit "Q"), admits that in the papers submitted to the Court of Appeals she had "set forth Appellants position alleging failure of due process both at the Appellate Division level and the Board of Standards and Appeals". To come forward now and claim that the issues presented in the federal forum have not been reviewed by the New York State Courts is merely an attempt to utilize the

civil rights statute for the purpose of harassing the Defendants.

THE DOCTRINES OF RES JUDICATA and COLLATERAL ESTOPPEL APPLY TO ACTUALLY LITIGATED ISSUES AND TO THOSE ISSUES THAT MIGHT HAVE BEEN LITIGATED

The res judicata doctrine, as interpreted by this Court and by the United States Supreme Court, binds the Appellants not only to the issues actually litigated, but also to any other points which might have been raised in the State proceeding.

"The proverbial 'right to a day in court' does not mean the full presentation of the case in the context of a formal, evidentiary hearing, but rather 'the right to be duly cited to appear and to be afforded an opportunity to be heard'. Olsen v. Muskegon Piston Ring Co., 117 F2d 163, 165 (6th Cir. 1941), quoted in 1B Moore's Federal Practice ¶ 0.409(1), at 1008 (1974)." Mitchell v. National Broadcasting Company, et al, supra.

"The res judicata doctrine, however, not only binds the parties and their privies as to grounds or issues actually litigated, but also 'as to any other admissible matter which might have been offered for any purpose'. Cromwell v. County of Sac, 94 U.S.351, 352 (1877); Commissioner of Internal Revenue v. Sunnen, 333 U.S.591 (1948); Saylor v. Lindsley, 391 F.2d 965, 968 (2d Cir. 1968); 1B Moore's Federal Practice ¶ 0.405 (1)(1974 ed.)". Sanchez v. Caribbean Carriers Limited, et al, supra.

In Judice v. Vail, _____U.S._____,51 LEd 2d 376, 97 S.Ct. ____(decided March 22, 1977), the United States Supreme Court clearly set forth the guidelines for federal abstention with respect to state court proceedings. Writing for the majority,

Justice Rehnquist stated:

"Here it is abundantly clear that appellees had an opportunity to present their federal claims in the state proceeding. No more is required to invoke Younger abstention. There is no support in Gerstein or in our other cases for the District Court's belief that the state courts must have an actual hearing (to which a recalcitrant defendant would presumably be brought by force) in order for Younger and Huffman to apply. Appellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings, Gibson v. Berryhill, 411 U.S.564, 577, 36 L Ed 2d 488, 93 S.Ct. 1689 (1973), and their failure to avail themselves of such opportunities does not mean that the state procedures were inadequate." (Emphasis by the Court) 51 L Ed 2d at 385.

The United States District Court of Appeals, Second Circuit, has declared in interpreting Judice v. Vail, supra, that

"[T]he Court held that for a federal court to abstain it was only necessary for the plaintiffs to have had an opportunity to raise the federal issue before the state court; it was not necessary that a hearing be held if they failed to employ available procedures. Overmeyer had ample opportunity to raise his federal claims before the state court. Thus, even if his constitutional claims had any merit, we would not consider them. Since there was no basis for diversity jurisdiction, diversity not having been alleged, the pendent claim was properly dismissed", Overmeyer v. Fidelity and Deposit Company of Maryland, et al, _____F.2d_____, (decided May 3, 1977)

The Appellants not only had ample opportunity to raise their federal issues before the state courts, but in fact, did raise them in each of the three appeals to the New York Court of Appeals, as shown above. Even assuming, however, that there exists a constitutional issue that was not presented to the New York State Courts, the doctrine set forth in Judice and Overmeyer definitively precludes the Appellants from now raising those issues before the federal district court.

THE JUDICE V. VAIL EXCEPTIONS ARE NOT APPLICABLE UNDER THE PRESENT FACTUAL CIRCUMSTANCES

The United States Supreme Court set forth two exceptions to

the abstention doctrine in Judice v. Vail, supra.

"We noted in Huffman that Younger principles do not apply, even where otherwise applicable, 'in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it". Huffman, supra, at 611, 43 L Ed 2d 482, 95 (5th Ct. 1200) 51 L Ed 2d, at 386

There is no contention hereunder that the existing statutes fall within the second exception listed above. As to the first exception, it is clear from the facts and history of this litigation that it is the Respondents who have been harrassed. The Appellants have used the courts to frustrate and bring economic hardship to the Respondents. Under the cloud of an alleged civil rights action, the Appellants are now attempting to continue this pattern within the federal courts. This court, when faced with a similar situation, made the following observation:

"28 U.S.C.§ 1912 and Federal Rule of Appellate Procedure 38 authorize this court upon a determination that an appeal is frivolous to award just damages and single or double costs to the appellee. Teledyne Industries, Inc. v. Podell, 546 F.2d 495 (2d Cir. 1976). The history of this litigation in the state courts and its continuation in the federal court, even before the Supreme Court had demolished the only semblance of support plaintiffs could muster, serves to illustrate that this appeal was and is frivolous. This court has been utilized, as were earlier the state and district courts, as a device to frustrate the collection of a judgment of a state court. We assess the appellants double costs and in addition $2,000 in attorneys' fees. The mandate shall issue forthwith and shall not be stayed by the filing of a petition for rehearing." Overmeyer v. Fidelity and Deposit Company of Maryland, supra.

CONCLUSION

The appeal presently pending before this court is without merit, as the Appellants, on three separate occasions, raised the identical issues before the New York State Court of Appeals. The dismissal of the Appellants' complaint, with prejudice, was proper in light of the factual history of this litigation. Turco v. The Monroe County Bar Association, et al, (supra); see Lackawanna Police Benevolent Association v. Balen, 446 F.2d 52, 53 (2d Cir. 1971); Lombard v. Board of Education of the City of New York, 502 F.2d 631, 637 (2d Cir. 1974), Cert. denied, 420 U.S. 976 (1975)

We think the statement of Circuit Judge Milligan in the case of Overmeyer v. Fidelity, U.S. Court of Appeals, 2nd Circuit, decided on May 3, 1977, is a most appropriate description of the course of proceedings initiated by Appellants and their counsel, "An attempt to pervert the federal process into a Dickensian Court where lawsuits never end".

The decision and order of Judge Lawrence W. Pierce should be sustained.

Respectfully submitted,

SHELDON LOBEL
Attorney for Respondents,
Kimball Construction Co., Inc.,
John Kimball and Marie A. Kimball

David B. Kweller
of Counsel

A 201 Affidavit of Service by Mail
COURT OF APPEALS
SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

IRVING ELLENTUCK, ET AL.,
Plaintiffs

- against -

JOSEPH B. KLEIN, ET AL,
Defendant

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Robert Martinez *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1165 Morris Avenue; Bronx, New York
That on the 19th *day of* July *19* 77*, deponent served the annexed*

upon **G Frey & Harkow, Esq** *attorney(s) for*

Brief

in this action, at **90-04 161st Street**
Jamaica, Queens, New York 11432

the address designated by said attorney(s) for that purpose by depositing 2 *true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this **19th**
day of **Muly July** *19* **77**

Robert Martinez

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979